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Supreme Court

of the

United States

CASE NUMBER: 80-88

TOMAS RICARDO SANCHEZ,
Petitioner,

-vs-

THE STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	3
QUESTION PRESENTED	4
CONSTITUTIONAL PROVISIONS	5
STATEMENT OF THE CASE AND FACTS	6
REASON FOR GRANTING WRIT:	
THE PETITIONER'S RIGHTS TO DUE PROCESS UNDER THE FEDERAL CONSTITUTION WERE DENIED UPON CONVICTION IN THE ABSENCE OF PROOF BEYOND A REASONABLE DOUBT OF HIS GUILT	18
CONCLUSION	25
CERTIFICATE OF SERVICE	26

TABLE OF CITATIONS

Page

Arant v. State,
256 So.2d 515 (1st DCA 1972) 23, 24

Broadnax v. State,
57 So.2d 651 (Fla. 1952) 23

Brownlee v. State,
354 So.2d 120 (3rd DCA 1978) 23

Camp v. State,
293 So.2d 114 (4th DCA 1974) 20

David v. State,
90 So.2d 629 (Fla. 1956) 23

D.J. v. State,
330 Sp.2d 35 (4th DCA 1976) 23

Douglas v. State,
214 So.2d 653 (3rd DCA 1968) 23

Falin v. State,
3rd DCA 1979, Florida Law Weekly, 2/16/79 at 331 22

Frank v. State,
199 So.2d 117 (1st DCA 1967) 23

Hivley v. State,
336 So.2d 127 (4th DCA 1976) 23

TABLE OF CITATIONS (Continued)

Page

Jackson v. Virginia,
____ U.S. ____, 99 S.Ct. 2781 (1979) 18

Lockett v. State,
262 So.2d 253 (4th DCA 1972) 23

McArthur v. State,
351 So.2d 972 (Fla. 1977) 23

Markman v. State,
210 So.2d 486 (3rd DCA 1968) 23

Moore v. Duckworth,
____ U.S. ____, 99 S.Ct. 3088 (1979) 18

Rutskin v. State,
260 So.2d 525 (1st DCA 1972) 23

Sindrich v. State,
322 So.2d 589 (1st DCA 1975) 23

Spataro v. State,
179 So.2d 873 (2nd DCA 1965) 23

State v. Hayes,
333 So.2d 51 (4th DCA 1976) 23

State v. Kemp,
305 So.2d 833 (3rd DCA 1974) 20, 21

Tanksley v. State,
332 So.2d 76 (2nd DCA 1976) 23

TABLE OF CITATIONS (Continued)

	Page
Torres v. State, 253 So.2d 450 (3rd DCA 1971)	23
Winchell v. State, 362 So.2d 995 (3rd DCA)	23

OTHER AUTHORITIES

Florida Statute §777.011	7
Florida Statute §893.13(1)(a)(2)	7

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THE STATE OF FLORIDA,

Respondent.

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Petitioner prays that a Writ of Certiorari be issued to review the Judgment of the District Court of Appeal of Florida, Third District, entered in the above-styled case on June 3, 1980, rehearing denied June 18, 1980.

OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported at ____ So.2d ____ and is printed in the Appendix.

JURISDICTION

The Judgment of the District Court of Appeal of Florida for the Third District was entered on June 3, 1980, rehearing denied June 18, 1980. Pursuant to Florida Rules of Appellate Procedure 9.030 and 1980 Amendment to Article V of the Florida Constitution relating to jurisdiction of the Florida Supreme Court, effective April 1, 1980, further review of this case in Florida Courts is not available. As such, the jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

1. Whether the Petitioner's rights to due process under Federal Constitution were denied upon conviction in the absence of proof beyond a reasonable doubt of his guilt.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides that:

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND FACTS

This Petition for Writ of Certiorari stems from a criminal trial held in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, The Honorable Alan R. Schwartz presiding. Upon direct appeal to the District Court of Appeal of Florida, Third District, the conviction was affirmed on June 3, 1980, rehearing denied June 18, 1980. Due to the jurisdictional limitations of the Florida Supreme Court as evidenced by the 1980 Amendment to Article V of the Florida Constitution and Florida Rules of Appellate Procedure 9.030 which limit discretionary review of per curiam opinions, Petitioner seeks to invoke the certiorari jurisdiction of this Honorable Court pursuant to 28 U.S.C. 1257(3).

In the trial Court below, the Petitioner, TOMAS RICARDO SANCHEZ, was the Defendant. The Respondent, The State of Florida, was the Plaintiff. In this Brief, the parties will be referred to as they stood in the trial Court. The symbol "R" will be used to designate the pages of the Record on Appeal. The symbol "T1" will be used to designate the transcript of proceedings held on September 8, 1978, and the proceedings held on October 19, 1978. The symbol "T2" will be used to refer to the transcript of proceedings held on January 8, 1979. All emphasis is added unless otherwise indicated.

On or about June 1, 1978, the Defendant surrendered on capias issued pursuant to the filing of an Information on the same date and was released at liberty on bail in the amount of $1,000.00, pending trial of this cause. (R. 1, 1a, 5, 6, 7, 8 and 9). As stated on June 1, 1978, the Plaintiff filed an Information charging

the Defendant with the offense of Unlawful Possession of Cannabis in an amount in excess of one hundred (100) pounds in violation of *Florida Statute* §893.13(1)(a)(2) and *Florida Statute* §777.011. (R. 1). Directly preceding the filing of the Information by the Plaintiff, an Affidavit in Support of the Information and finding of probable cause was filed with the Clerk of the Circuit Court. (R. 5, 6, 7, 8 and 9). On June 7, 1978, the Defendant filed a written Plea of Not Guilty waiving Arraignment and demanding trial by Jury. Further, said written Plea of Not Guilty requested an additional fifteen (15) days from the time of Arraignment in which to file Motions attacking the sufficiency of the Information. (R. 10).

Within the fifteen (15) day period from the date of Arraignment, the Defendant filed a Motion for Bill of Particulars pursuant to Florida Rule of Criminal Procedure 3.140(n). (R. 11, 12 and 13). This Motion was granted on June 21, 1978, as to paragraph 1 and 2 of the Motion for Bill of Particulars and denied as to the remaining portion of said Motion. (R. 13a). On June 28, 1978, the Plaintiff filed their Statement of Particulars as required by the Court's Order. (R. 33).

At the time of Arraignment, the Defendant invoked the reciprocal provisions of Florida Rule of Criminal Procedure 3.220 and on June 21, 1978, and June 28, 1978, the Plaintiff filed their Response to said Reciprocal Demand for Discovery. (R. 25 to 30, 31 and 32).

From June 28, 1978, through, to and including September 6, 1978, the Defendant engaged in discovery

proceedings in preparation of the cause for evidentiary Motions and trial, along with co-Defendant, BRUNO CARLOS GARCIA.

On September 7, 1978, the Defendant appeared before the Court for the purpose of presenting testimony and exhibits in support of his previously filed Motions to Suppress Physical Evidence Obtained Through Unlawful Search and Seizure, his Motion to Dismiss on Constitutional grounds, and his Sworn Motion to Dismiss filed pursuant to Florida Rule of Criminal Procedure 3.190(c)(4). (The Motion to Suppress Physica! Evidence Obtained Through Unlawful Search and Seizure and the Memorandum of Law in support thereof are contained within the Record on Appeal in this cause at R. 38 to 45a and 64 to 68a.) (The Defendant's Sworn Motion to Dismiss pursuant to Florida Rule of Criminal Procedure 3.190(c)(4) is contained within the Record on Appeal in this cause at R. 45 to 49a.)

The State of Florida filed no pleadings in response to the Defendant's Sworn Motion to Dismiss but did announce prior to argument on said Motion that they orally demurred to said Motion. The Motion was denied on September 7, 1978. Thereafter, an evidentiary hearing was held with respect to the Defendant's Motion to Suppress Physical Evidence Obtained Through Unlawful Search and Seizure and, at the conclusion of said evidentiary hearing, the Motion was denied. (R. 45a). This Motion was subsequently renewed by the filing of a Memorandum of Law in Support of the Motion to Suppress Physical Evidence Obtained Through Unlawful Search and Seizure and was again denied. (R. 64 to 68a). The Defendant's Motion to

Dismiss on Constitutional grounds was denied without presentation of evidence (the Court having treated as evidentiary the exhibits attached to and incorporated by reference in the Motion to Dismiss) on September 7, 1978. (R. 21a). On October 19, 1978, TOMAS RICARDO SANCHEZ appeared before the Court with counsel and withdrew his previous demand for trial by jury and waived trial by jury. (R. 1; T1. 61, 62). Thereafter, a non-jury trial commenced at the conclusion of which the Court found the Defendant guilty of the charge contained in the Information. (R. 3; T1. 141).

On October 23, 1978, the Defendant timely filed his Motion for New Trial. (R. 70, 71). On January 8, 1979, the Defendant appeared before The Honorable Alan R. Schwartz, Circuit Judge, for the purpose of sentencing and, on that date, he was adjudicated guilty of the offense alleged in the Information and sentenced to a term of three (3) years in the State Penitentiary. (R. 2, 4; T2. 10). On the same date, January 8, 1979, TOMAS RICARDO SANCHEZ timely filed his Notice of Appeal (R. 75, 76) and his Motion for Supersedeas Bond. (R. 77, 78). On January 8, 1979, the Motion for Supersedeas Bond was granted and the Defendant released at liberty on a $7,500.00 surety bond. (R. 77). Lastly, on the same date, January 8, 1979, prior to sentencing, the Court denied the Defendant's Motion for New Trial. (R. 71a).

Defendant's conviction was affirmed by the District Court of Appeal of Florida, Third District on June 3, 1980, rehearing denied June 18, 1980.

The facts which were adduced at trial are as follows.

AS TO THE SEARCH, SEIZURE, ARREST AND SUFFICIENCY OF EVIDENCE:

In the first and second weeks of May, 1978, an investigation was initiated in Hillsborough County, Florida, into suspicious activities occurring at a farm located in Brandon, Florida. On May 14, 1978, agents of the Tampa Police Department and agents of the Florida Department of Criminal Law Enforcement followed a U-Haul truck from this farm to a residence address in Miami, Dade County, Florida. This address was 6330 Southwest 41st Street. (T1. 28, 43 to 46, 65, 66). After the U-Haul truck arrived at the residence address at 6330 Southwest 41st Street, it was observed to go to a rear building located at that address and thereafter agents who were surveilling the area heard noises and voices consistent with the efforts of people unloading the contents of this truck into the rear building. (T1. 50, 51).

After this U-Haul truck was apparently unloaded, it exited the residence property and proceeded to a parking lot on the Northeast corner of Southwest 20th Avenue and Southwest 8th Street, Miami, Florida. (T1. 67). The U-Haul truck was parked at this location and the driver of the truck, whether from Brandon, Florida, to the residence address, or from the residence address to the parking lot at Southwest 20th Avenue and Southwest 8th Street, was not identified. Specifically, no evidence was offered to establish that either TOMAS RICARDO SANCHEZ or his co-Defendant, BRUNO CARLOS GARCIA, were the driver of the truck on either occasion. Additionally, no evidence was offered to establish that either man was present when the truck was apparently unloading at the rear building of the residence property on May 14, 1978. (T1. 69).

After the U-Haul truck was parked at Southwest 20th Avenue and Southwest 8th Street, (T1. 71) Michael Simpkins, Tampa Police Department Officer, went to the rear of the truck and, on the tailgate of the truck, observed a small amount of what appeared to be marijuana residue on the tailgate of the truck. (T1. 47, 71). Further, Simpkins smelled what appeared to be marijuana in the area of the truck. (T1. 47). The residue which Simpkins found on the tailgate of the U-Haul truck was in an amount of approximately one (1) gram. (T1. 49, 72). Simpkins did not know how long the marijuana residue had been on the tailgate of the truck (T1. 49, 50) and he saw no other contraband inside the truck itself. (T1. 50).

During the early afternoon hours of May 16, 1978, Bruno Carlos Garcia was observed arriving at the residence located at 6330 Southwest 41st Street, Miami, Florida. Garcia was admitted into the home (which is the structure in front of the rear garage-type building) by a person later identified as TOMAS RICARDO SANCHEZ. (T1. 80). After a brief interval, Garcia and SANCHEZ were observed exiting from a rear door of the home. The two men were then seen to go into the rear, garage-type structure. (T1. 81). Some moments later, the two men exited the rear, garage-type structure and, at that time, SANCHEZ was observed carrying a rectangular-shaped object (T1. 39, 81) which was wrapped in opaque, black plastic. (T1. 38, 81). Agent Williamson of the Florida Department of Criminal Law Enforcement, who observed this occurrence, could neither smell the contents of this package nor see the contents of this package. (T1. 38). Garcia and SANCHEZ were then seen to re-enter through the rear

door of the home and, some moments later, to exit the front door of the home. (T1. 39, 82). As the two men left the home walking towards Southwest 41st Street, SANCHEZ was observed carrying what appeared to be the same black, plastic-wrapped, opaque rectangular object. (T1. 39, 82). The two men walked to the rear of a white Chevrolet Monte Carlo and SANCHEZ put the black, plastic-wrapped, opaque object into the trunk of the vehicle. (T1. 39, 82). The trunk was then closed and Garcia left the area in a different vehicle. (T1. 40). At approximately 4:30 P.M. (1630 hours), SANCHEZ was observed leaving the area in the Monte Carlo in which the black, plastic-wrapped opaque rectangular object had previously been placed. (T1. 40, 85). Although this vehicle and SANCHEZ were followed, the surveillance of the vehicle was terminated when the agents following SANCHEZ lost sight of him and the contents of the trunk of this vehicle and of the package wrapped in black plastic were never determined. (T1. 40, 98).

Later in the day of May 16, 1978, at approximately 7:20 P.M. (T1. 10, 85), Bruno Carlos Garcia was observed arriving at the residence located at 6330 Southwest 41st Street, Miami, Florida, in a green 1978 Ford pickup truck with a white camper top fully enclosing the bed of the pickup truck. (T1. 6, 10, 85, 104). Garcia was seen driving this vehicle to the rear building at this address where the pickup truck was backed up to garage doors. An agent had stationed himself on adjoining property behind a dense hedge. (T1. 11, 12, 13; R. 63, 64, 66, 67, 104). From this vantage point on the adjoining property, Agent James Morton of the Florida Department of Criminal Law Enforcement observed Garcia remove one burlap-wrapped

rectangular object from the garage and place this object into the rear of the pickup truck. (T1. 14, 104). The agent could neither see the contents of this package nor smell the contents of the package. (T1. 15). Additionally, the agent was able to observe other similarly wrapped rectangular objects in the garage area. (T1. 15). The agent was unable to testify that he knew what the contents of any of the rectangular objects was. (T1. 15). As soon as Williamson made this observation, he left his surveillance position and advised other agents of his observation. (T1. 15, 104, 105, 106).

A short time later, the 1978 Ford pickup truck with the white camper top was followed from 6330 Southwest 41st Street to a Winn Dixie parking lot located within the confines of the City of Miami, Dade County, Florida. (T1. 5, 105, 106). The truck arrived at this parking lot at 7:47 P.M. on May 16, 1978. (T1. 6, 105, 106). Between the time the agents had initially seen SANCHEZ and Garcia together at the residence at 6330 Southwest 41st Street, Miami, Dade County, Florida, at approximately 4:30 P.M. on May 16, 1978, through, to and including the arrival of the pickup truck at the Winn Dixie parking lot at 7:47 P.M. on the same date, no warrant had been obtained for the arrest of either Garcia or SANCHEZ and no warrant had been obtained to search either the pickup truck or the rear building at 6330 Southwest 41st Street. (T1. 8).

Upon the arrival of the Defendant Garcia at the Winn Dixie parking lot, he was observed exiting the driver's seat of the vehicle and stepping on to the parking lot. No persons other than the Defendant Garcia and the investigating agents were present in the area at that time. (T1. 7, 105, 106).

As Mr. Garcia exited the truck, he was immediately placed under arrest for felony possession of cannabis. (T1. 7, 105, 106). The cannabis for which Mr. Garcia was being arrested and for which he was subsequently charged was that cannabis contained in the 1978 Ford pickup truck. (T1. 7; R. 51; the Statement of Particulars under Florida Criminal Procedure 3.140(n) filed by the Plaintiff in this cause states as follows: "As to the Defendant, Bruno Carlos Garcia, the alleged offense occurred between 6:55 P.M. and 7:47 P.M. on May 16, 1978, at or in the vicinity of 6330 Southwest 41st Street, Miami, Dade County, Florida, and in a parking lot located at the intersection of Southwest 67th Avenue and Southwest 40th Street, Miami, Dade County, Florida.") This arrest of the Defendant Garcia was predicated solely upon the earlier observation by Agent James Morton wherein he observed ". . . Mr. Garcia loading what I suspected to be a bale of marijuana in that truck." (T1. 7).

At the time of Garcia's arrest, no warrant had been issued for his arrest. (T1. 8). Immediately after his arrest, Garcia was handcuffed. (T1. 8). Immediately after being handcuffed, Garcia was given into the custody of another agent. (T1. 9). Garcia, at the time of his arrest, was not armed and posed no threat to Agent Morton or any of the other officers in the area. (T1. 9).

After Garcia was arrested and handcuffed and turned over to the custody of another agent of the Florida Department of Criminal Law Enforcement, the rear of the pickup truck was opened and searched and a quantity of marijuana in excess of one hundred (100) pounds was seized from the rear of the pickup truck. (T1. 9, 105, 106).

Before the rear of the pickup truck was opened, no consent or permission was obtained from Mr. Garcia for this search. (T1. 9). Specifically, twenty-eight (28) bales of marijauna were located in the rear portion of the pickup truck. (T1. 10). As the agent testified and as the Bill of Particulars filed in the cause specifies, it is the marijuana which was the predicate for the charge against the Defendant, Bruno Carlos Garcia, in this cause.

Before the rear portion of the pickup truck was opened and searched, the agents neither saw nor smelled anything to indicate that the truck actually contained marijuana or any other contraband. (T1. 8). No attempt to obtain a warrant to search the truck was made and, in fact, it was searched without a warrant. (T1. 8).

From the testimony adduced at the evidentiary hearing on the Defendant's Motion to Suppress Physical Evidence Obtained Through Unlawful Search and Seizure, it is apparent that the arrest of Bruno Carlos Garcia was predicated upon the earlier observation of his placing a burlap-wrapped rectangular object into the rear of the pickup truck. The contents of this object were not known until after the arrest, search and seizure had taken place. (T1. 15).

Upon searching the pickup truck which had been driven by co-Defendant Bruno Carlos Garcia and finding twenty-eight (28) bales of marijuana, the arresting agents forwarded this information to other agents assisting them in the investigation and an Affidavit for Search Warrant for the residence located at 6330 Southwest 41st Street, Miami, Dade County,

Florida, was prepared. (R. 55, 56, 67, 58). During the late evening hours of May 16, 1978, a search warrant was issued for the premises described as 6330 Southwest 41st Street, Miami, Dade County, Florida. (R. 58).

At approximately 12:40 A.M. on May 17, 1978, the search warrant was executed at this residence address. (T1. 111). A search of the rear building located at 6330 Southwest 41st Street, Miami, Dade County, Florida, produced a quantity of marijuana. (T1. 123).

It is this marijuana which was seized from the rear building at 6330 Southwest 41st Street, Miami, Dade County, Florida, which provided the basis for the charge against the Defendant, TOMAS RICARDO SANCHEZ. (R. 33; Statement of Particulars under Florida Rule of Criminal Procedure 3.140(m) as to the Defendant TOMAS RICARDO SANCHEZ states as follows: "As to the Defendant, TOMAS RICARDO SANCHEZ, the alleged offense occurred between May 14, 1978, at 6:30 P.M. and May 17, 1978, at 12:40 P.M. at or in the vicinity of 6330 Southwest 41st Street, Miami, Dade County, Florida.")

A complete search of the rear building where the marijuana was seized failed to reveal evidence that anyone lived in this building. (T1. 124). When the search warrant was executed, only Carmen Sanchez, the estranged wife of TOMAS RICARDO SANCHEZ, was present. (T1. 97). Other than on May 16, 1978, between 2:10 P.M. and 4:30 P.M., TOMAS RICARDO SANCHEZ was not observed to be at or about the residence of 6330 Southwest 41st Street, Miami, Dade County, Florida. (T1. 95, 96).

The arresting agent's testimony was that they could neither see nor smell the rectangular object which TOMAS RICARDO SANCHEZ was observed carrying to the white Monte Carlo on May 16, 1978, and they did not know what was inside the object. (T1. 98).

Further, the rectangular object wrapped in black plastic which agents observed TOMAS RICARDO SANCHEZ carrying to the white Monte Carlo did not appear to be wrapped in the same fashion as the subsequently discovered marijuana. (T1. 98, 99).

During the early evening hours of May 16, 1978, when Bruno Carlos Garcia was observed at the rear building with the pickup truck, he was in the company of an unknown male person. This person was not TOMAS RICARDO SANCHEZ. (T1. 104, 109).

After TOMAS RICARDO SANCHEZ surrendered on the warrant in this cause, at the Dade County Jail on May 19, 1978, (T1. 128), he spoke briefly with Agent Sergio Abreu of the Florida Department of Criminal Law Enforcement and stated that he used to live at 6330 Southwest 41st Street, Miami, Dade County, Florida, but that he no longer lived there inasmuch as he was estranged from his wife. He did admit visiting his wife and children frequently. (T1. 130).

Subsequent to the Defendant's conviction on these charges, conviction was affirmed by the District Court of Appeal of Florida, Third District, on June 3, 1980, rehearing denied June 18, 1980. This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING WRIT

THE PETITIONER'S RIGHTS TO DUE PROCESS UNDER THE FEDERAL CONSTITUTION WERE DENIED UPON CONVICTION IN THE ABSENCE OF PROOF BEYOND A REASONABLE DOUBT OF HIS GUILT.

Pursuant to *Moore v. Duckworth,* ____ U.S. ____, 99 S.Ct. 3088 (1979) and *Jackson v. Virginia,* ____ U.S. ____, 99 S.Ct. 2781 (1979), the determination as to whether the record evidence could support a finding of guilt beyond a reasonable doubt raises a Federal question of due process. However, the standard to be applied in determining whether the Defendant has been afforded due process in being convicted solely upon the establishment of guilt beyond a reasonable doubt is a State standard. "The standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by State law." *Jackson v. Virginia, supra,* at footnote 16.

It is unquestionably of the law of the State of Florida that where a prosecution relies for a conviction upon circumstantial evidence that the following strictures apply:

1. The circumstances themselves must be proved beyond a reasonable doubt.

2. The circumstances must be consistent with guilt and inconsistent with innocence.

3. The circumstances must be of such a conclusive nature and tendency that (the trier of fact is) convicted beyond a reasonable doubt of the Defendant's guilt or of the fact to be proved.

If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, (the trier of fact) must accept that construction indicating innocence. (Florida Standard Jury Instructions, Criminal Cases, as revised 4/28/78).

If one applies this test as promulgated by the Florida Supreme Court to the facts adduced at the trial of TOMAS RICARDO SANCHEZ, it is clear that either: a) the trial Court should have granted his Sworn Motion to Dismiss, or; b) the trial Court should have granted his Motion for Judgment of Acquittal at the conclusion of the State's evidence, or; c) the trial Court should have granted his Motion for Judgment of Acquittal made at the conclusion of all of the evidence, or; d) the trial Court should have acquitted the Defendant.

Prior to the time of trial in this cause, TOMAS RICARDO SANCHEZ filed a Sworn Motion to Dismiss and Discharge pursuant to Florida Rules of Criminal Procedure 3.190(c)(4). (R. 46, 49). This Motion was heard by the trial Court on September 7, 1978. The State of Florida filed no responsive pleading to the Sworn Motion to Dismiss and, prior to the Court hearing argument on said Motion, announced that they orally demurred to the Motion. Inasmuch as the State filed no traverse to the Sworn Motion to Dismiss and simply demurred, it is axiomatic that: "Factual matters alleged

in a Motion to Dismiss shall be deemed admitted unless specifically denied by the State in such traverse." (Florida Rules of Criminal Procedure 3.190(d); *Camp v. State,* 293 So.2d 114 (4th DCA 1974); *State v. Kemp,* 305 So.2d 833 (3rd DCA 1974)).

In *Camp, supra,* he was charged with possession of narcotic drugs and barbiturates. His attorney filed a Sworn Motion to Dismiss alleging that the Defendant did not have knowledge that the narcotics were on his premises nor did he exercise exclusive control over the premises. In reversing the trial Court's denial of Camp's Motion to Dismiss, the District Court of Appeal held that since the State did not contest the Defendant's factual allegations of lack of knowledge of the presence of the drugs on his premises that allegation was deemed admitted. Further, since knowledge or scienter was an essential element of the charge against Camp and since the facts establish a situation involving joint possession of premises, the material allegation in the Information, i.e. possession, was disputed by the Defendant's Sworn Motion sufficiently so as to overcome the prima facie established by the Information; unless traversed by the State in accordance with Rule 3.190(d), the factual matters contained in the Defendant's Sworn Motion were admitted; became "undisputed;" and established a valid defense to the charge.

In the instant case, the facts are almost, if not entirely, identical to the facts in *Camp, supra.* The primary tenant of the premises located at 6330 Southwest 41st Street, Miami, Dade County, Florida, was the Defendant's estranged wife, Maria Carmen Sanchez. The Defendant was seen to be at this residence

address on only one occasion within the time frame specified in the Information. That date was May 16, 1978, and the Defendant was observed at the residence on that date for a period of time less than three (3) hours. The Defendant was observed to go to the rear building which was later determined to contain a quantity of marijuana for a brief period of time exceeding no more than five (5) to ten (10) minutes. No evidence in the cause established the Defendant to be in the knowing possession of cannabis as alleged in the Information. The Sworn Motion to Dismiss and Discharge alleged, without traverse, that there was no evidence to establish, in the light most favorable to the State of Florida, SANCHEZ was in the knowing and joint or exclusive possession of cannabis subsequently found in the rear building on May 17, 1978.

As this Court stated in *Kemp, supra:* "The Rule also provides that factual matters alleged by the Defendant in his Motion to Dismiss shall be deemed admitted unless specifically denied in the traverse." The State did not contest the circumstances upon which they relied for a conviction in this cause. Those circumstances, standing alone, fail to establish prima facie, the guilt of the Defendant, TOMAS RICARDO SANCHEZ.

The mere fact that the rear structure at 6330 Southwest 41st Street was later determined to contain a quantity of marijuana can hardly be said to prove beyond a reasonable doubt that TOMAS RICARDO SANCHEZ was in the joint or exclusive custody, control or possession of the substance. The further fact that SANCHEZ was seen carrying a rectangular, black

plastic-wrapped object from the rear garage building to an automobile is not conclusive beyond a reasonable doubt either. As the Statement of the Facts clearly sets forth, the agents never determined the contents of this package and, in any event, their testimony at trial was that the object carried to the car by SANCHEZ did not appear to be wrapped in the same fashion as the cannabis which they subsequently discovered in the rear building at 6330 Southwest 41st Street. (T1. 98, 99).

On similar facts substantially more persuasive than those in this cause, this Court recently reversed a conviction in *Falin v. State,* 3rd DCA 1979, Florida Law Weekly, 2/16/79 at page 331. In that case, a quantity of contraband (two bags of marijuana) was found in a suitcase which also contained a B.B. gun. After his arrest, Falin admitted that he owned the B.B. gun which had been found in the same suitcase with the marijuana. Falin was then questioned as to whether the marijuana was his and he remained completely silent on that issue. Like SANCHEZ, Falin was not in the hotel room when the contraband was found. The record fails to indicate where SANCHEZ was when the search warrant was executed on May 17, 1978. Falin had advised the officers that he was staying in the hotel room from which the marijuana was subsequently seized. This Court, citing an unbroken line of cases, stated: "In sum, there is no evidence in the record which eliminates the perfectly reasonable hypothesis of innocence that the drugs and implement came into the room without Falin's knowledge and, indeed, after he had already left." This Court further stated that the circumstantial evidence must eliminate all reasonable hypotheses of innocence and that the circumstances relied upon for the conviction failed to do so.

Where premises are jointly possessed or primarily possessed by a person other than the accused, it is the burden of the State to establish, beyond a reasonable doubt, that the accused both knew of the presence of the contraband and that the accused had the ability to reduce the contraband to his immediate and exclusive or joint control. (See *Winchell v. State,* 362 So.2d 995 (3rd DCA); *Sindrich v. State,* 322 So.2d 589 (1st DCA 1975); *Frank v. State,* 199 So.2d 117 (1st DCA 1967); *David v. State,* 90 So.2d 629 (Fla. 1956); *State v. Hayes,* 333 So.2d 51 (4th DCA 1976); *Arant v. State,* 256 So.2d 515 (1st DCA 1972); *Rutskin v. State,* 260 So.2d 525 (1st DCA 1972); *Torres v. State,* 253 So.2d 450 (3rd DCA 1971); *Tanksley v. State,* 332 So.2d 76 (2nd DCA 1976); *Spataro v. State,* 179 So.2d 873 (2nd DCA 1965); *Markman v. State,* 210 So.2d 486 (3rd DCA 1968); *D.J. v. State,* 330 So.2d 35 (4th DCA 1976); *Broadnax v. State,* 57 So.2d 651 (Fla. 1952); *Douglas v. State,* 214 So.2d 653 (3rd DCA 1968); *Lockett v. State,* 262 So.2d 253 (4th DCA 1972); *Brownlee v. State,* 354 So.2d 120 (3rd DCA 1978); *Hively v. State,* 336 So.2d 127 (4th DCA 1976); and *McArthur v. State,* 351 So.2d 972 (Fla. 1977).)

As stated in *Tanksley v. State, supra:* "To prove constructive possession, the State had to show Appellant knew of the presence of narcotics and had the ability to reduce it to his personal dominion. (Citation omitted). Appellant's presence on the lot and his denial of possession of narcotics are not sufficient circumstantial evidence to indicate the requisite knowledge of the drugs. Nor is the *presence of his fingerprint on the heroin containing envelope* sufficient evidence of Appellant's awareness of the drugs."

Guilt cannot rest upon probabilities. *(Arant v. State, supra.)*

Alternatively, TOMAS RICARDO SANCHEZ was legally entitled to one of the following Orders: a) the granting of his Sworn Motion to Dismiss; b) the granting of his Motion for Judgment of Acquittal made at the conclusion of the State's evidence; c) the granting of his Motion for Judgment of Acquittal made at the conclusion of all of the evidence; d) a verdict of not guilty.

The Defendant does not suggest that any one of these particular remedies would be more appropriate than any other in the present posture of this cause. However, proceeding chronologically, the Defendant initially urges this Court to reverse the trial Court's decision on his Sworn Motion to Dismiss. In the event that this Court affirms the trial Court's decision on that Motion, the Defendant then requests this Court to proceed chronologically, point-by-point, and determine whether the trial Court erred in its denial of the Defendant's Motions for Judgment of Acquittal and/or in the finding and adjudication of guilt of the Defendant on the facts in this cause.

Thus since the trial Court and the Court of Appeals of Florida for the Third District each ruled that there was sufficient evidence upon which to convict the Defendant and since, as supported by the record, the Defendant contends that there was absolutely no evidence upon which a jury could determine the establishment of guilt beyond a reasonable doubt, the Petitioner herein respectfully seeks this Court to issue its Writ of Certiorari.

CONCLUSION

For the above reasons and authorities cited herein, it is respectfully requested that this Honorable Court grant this Writ of Certiorari and enter its Order quashing the decision hereby sought to be reviewed and grant such other and further relief as seems right and appropriate to this Court.

Respectfully submitted,

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& ROSS, P.A.
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Miami, Florida 33131
Telephone No.: (305) 373-0110

BY:_____
WILLIAM R. TUNKEY

BY:_____
RONALD A. DION

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this day of July, 1980, to the Office of the Attorney General, 401 Northwest 2nd Avenue, Suite 820, Miami, Florida, 33132.

WEINER, ROBBINS, TUNKEY
& ROSS, P.A.

BY:_____
WILLIAM R. TUNKEY

BY:_____
RONALD A. DION

Appendix

APPENDIX

[JUN 04 1980]

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1980

CASE NO. 79-124

TOMAS RICARDO SANCHEZ,
Appellant,

vs.

THE STATE OF FLORIDA,
Appellee.

Opinion filed June 3, 1980.

An Appeal from the Circuit Court for Dade County, Alan R. Schwartz, Judge.

Weiner, Robbins, Tunkey & Ross and Ronald A. Dion, for appellant.

Jim Smith, Attorney General and Calvin L. Fox, Assistant Attorney General, for appellee.

Before HENDRY, NESBITT and BASKIN, JJ.

PER CURIAM.

Affirmed.

IN THE DISTRICT COURT OF APPEAL OF
FLORIDA THIRD DISTRICT

CASE NUMBER: 79-124

CIRCUIT NUMBER: 78-7541 B

TOMAS RICARDO SANCHEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

MOTION FOR RE-HEARING

COMES NOW the Appellant, TOMAS RICARDO SANCHEZ, by and through his undersigned counsel and files this Motion for Re-Hearing pursuant to Florida Rules of Appellate Procedure 9.330(a) and would allege in furtherance thereof as follows:

1. Issue One contained in the Brief which was the subject of Oral Argument concerns the sufficiency of the evidence to establish the Defendant's guilt of possession of contraband. The Defendant would respectfully submit that the evidence, even in the light most

favorable to the State, does not establish a showing of sufficient evidence upon which a conviction could be sustained.

2. Specifically, although the Defendant was observed to have entered the independant garage structure, said structure consisted of three rooms and not a single room as alleged by the Government. (TR. 124). No testimony was ever received into evidence to establish which of the three rooms the Defendant entered.

3. Furthermore, the house at which the ultimate search took place did not belong to the Defendant, but rather to his estranged wife and children. (TR. 130-132). Although the Defendant did in fact visit the residence on occasion, there was no testimony to show that he had the ability to control any of the items ultimately found in the independant garage structure nor that he had knowledge of their existence.

4. The sole factor on which the Government attempted to establish the Defendant's knowledge as to the contents of said garage area was that he had been observed carrying a black opaque trash bag. (TR. 81-84).

5. The surveilling officers testified that they had no knowledge as to the contents of said trash bag. (TR. 98). Furthermore, since it was never taken into police custody, the contents of said black bas was never determined. (TR. 98).

6. In addition, although three hundred and twenty bales (320) of marijuana were ultimately seized, the

condition of the single trash bag with which the Defendant was observed was not the same as any of those bales. Specifically, the trash bag with which the Defendant was observed was not wrapped, but only twisted closed at the top, the normal way of securing such a bag. (TR. 101).

7. Although at Oral Argument the State alleged that at least one of the objects found in the garage area was contain in the black plastic trash bag twist-tied at the top, said statement is totally unsupported by the record. Neither in the record, the Brief, in Oral Argument or in conversations subsequent thereto has the State been able to establish the correctness of said statement.

WHEREFORE, the Defendant would respectfully request this Honorable Court to grant this Motion for Re-Hearing and to reconsider based upon the evidence presented in the Record the question of sufficiency of evidence.

Respectfully submitted,

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& ROSS, P.A.
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Telephone: (305) 373-0110

BY: /s/ WILLIAM R. TUNKEY
WILLIAM R. TUNKEY

BY: /s/ RONALD A. DION
RONALD A. DION

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Re-Hearing was furnished to the Office of the Attorney General, 401 N.W. 2nd Avenue, Miami, Florida, 33132, on this the 5th day of June, 1980.

WEINER, ROBBINS, TUNKEY & ROSS, P.A.

BY: /s/ WILLIAM R. TUNKEY
WILLIAM R. TUNKEY

BY: /s/ RONALD A. DION
RONALD A. DION

[JUN 9 1980]

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

JANUARY TERM, A.D. 1980

JUNE 18, 1980

CASE NO. 79-124

TOMAS RICARDO SANCHEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Counsel for appellant having filed in this cause motion for rehearing, and same having been considered by the court which determined the cause, it is ordered that said motion be and it is hereby denied.

A True Copy

ATTEST:

/s/ [Illegible]
Clerk District Court of
Appeal, Third District

cc: William R. Tunkey
Jim Smith

/sh

NOTE:

IN THE EVENT A MOTION FOR STAY IS NOT APPLIED FOR, THE MANDATE IN THE ABOVE STYLED CAUSE WILL AUTOMATICALLY ISSUE AFTER THE EXPIRATION OF FIFTEEN DAYS FROM DATE HEREOF *WITHOUT FURTHER NOTICE.*